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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended working group
on a draft optional protocol to
the Convention on the Rights of
the Child on involvement of
children in armed conflicts
Fifth session
Geneva, 11-22 January 1999

COMMENTS ON THE REPORT OF THE WORKING GROUP

Report of the Secretary-General

CONTENTS

		Page
Introduction		3
I.	COMMENTS RECEIVED FROM STATES	4
	A. New Zealand	4
	B. Trinidad and Tobago	4
II.	COMMENTS SUBMITTED BY UNITED NATIONS BODIES TREATY BODIES AND INTERGOVERNMENTAL ORGANIZATIONS	5
	A. United Nations High Commissioner for Refugees	5
	B. United Nations Population Fund	6
	C. Committee on the Rights of the Child	6
	D. Council of Europe	9

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CONTENTS (continued)

		Page
III.	COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS	9
	A. Friends World Committee for Consultation (Quakers)	9
	B. International Federation Terre des Hommes	12
	C. World Alliance of Reformed Churches	13

Introduction

1. In paragraph 14 (a) of its resolution 1998/76 of 22 April 1998, entitled "Rights of the child", the Commission on Human Rights requested the Secretary-General to transmit the report of the working group on a draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (E/CN.4/1998/102 and Add.1) to Governments, relevant United Nations bodies and specialized agencies, the Committee on the Rights of the Child, the Special Representative on the impact of armed conflict on children, and intergovernmental and non-governmental organizations, and to invite their comments on the draft protocol contained in annex I negotiated in plenary, as well as on annex II containing the "Chairman's perception" based on informal consultations, in time for circulation prior to the next session of the working group.

2. Pursuant to that resolution, the Secretary-General, on 27 July 1998, addressed requests to Governments, United Nations bodies, specialized agencies, the Committee on the Rights of the Child and intergovernmental and non-governmental organizations concerned, for comments on the report of the working group on its fourth session.

3. By 20 October 1998, replies had been received from the following States: New Zealand, Trinidad and Tobago.

4. Replies were also received from the Food and Agriculture Organization of the United Nations, the Office of the United Nations High Commissioner for Refugees, the United Nations Population Fund, the Committee on the Rights of the Child, the Council of Europe (European Commission on Human Rights) and the Organisation for Economic Cooperation and Development.

5. Comments were submitted by the Friends World Committee for Consultation (Quakers), the International Federation Terre des Hommes and the World Alliance of Reformed Churches.

6. The present report contains a summary of the substantive replies received. Any additional replies will be reproduced in an addendum to the present document.

I. COMMENTS RECEIVED FROM STATES

A. New Zealand

[Original: English]
[24 September 1998]

1. With regard to the Report of the Working Group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts (E/CN.4/1998/102), the New Zealand Government considers that the "Chairman's perception" text as annexed to that report represents a near consensus of the working group and should form the basis of further work by the group to finalize a draft optional protocol.

2. The New Zealand Government supports the adoption of 18 years as the minimum age for participation in armed conflict. New Zealand also supports a minimum age limit of 18 years for conscription into the armed forces and a minimum age limit of 17 years for voluntary recruitment.

3. The harmful effects of armed conflict on children highlighted in the report by Mrs. Graça Machel, the expert appointed by the Secretary-General, demonstrate the need for urgent action by Governments to raise and improve the international standards of protection for all children from armed conflict.

4. The New Zealand Government considers that agreement on the text of a draft optional protocol which raises the minimum age limits set out in the Convention on the Rights of the Child should be pursued as a matter of priority, and hopes that this work can be concluded at a final session of the working group in January 1999.

B. Trinidad and Tobago

[Original: English]
[7 October 1998]

1. Trinidad and Tobago would wish to express its regret that no consensus has been reached with respect to an optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.

2. Although the issue does not directly impact on this country, the following observations should be noted, in the event of international consensus in the future:

(a) Since children are defined by the Convention as persons under the age of 18 years, no person below that age should be involved in armed hostilities, directly or indirectly, in State or private armies;

(b) An optional protocol should not allow for reservations: and

(c) The Committee on the Rights of the Child must have a mechanism for challenging States parties who appear to be flouting the optional protocol.

II. COMMENTS SUBMITTED BY UNITED NATIONS BODIES, TREATY BODIES AND INTERGOVERNMENTAL ORGANIZATIONS

A. Office of the United Nations High Commissioner for Refugees

[Original: English]
[23 September 1998]

1. It is recognized that in today's wars, refugee children and adolescents are no longer incidental victims of conflict and displacement, but rather are increasingly targeted for militarization, politicization and exploitation. Refugee children, and those recently having voluntarily repatriated to their countries of origin, are among those at highest risk of illegal recruitment. UNHCR thus has a strong mandated interest in well-grounded international legal standards for the protection of children affected by armed conflict.

2. During its last session in October 1997, the Executive Committee of the UNHCR Programme adopted a Conclusion on Refugee Children and Adolescents which "call[ed] upon States to participate constructively in the negotiations on an optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts with the aim of an early agreement on the text". UNHCR wishes to again reiterate its strong support for the drafting of this optional protocol. In addition, we wish to take this opportunity to comment on a number of different elements which have been debated during the drafting process.

3. UNHCR is firmly of the view that there should be a clearly designated limit of 18 years for all forms of participation in the armed forces, whether direct or indirect and whether involving compulsory or voluntary recruitment. Establishing 18 as the minimum age would be consistent with the general age of majority under the Convention on the Rights of the Child and a number of other provisions in international law providing for special protection for those below the age of 18 years.

4. UNHCR also supports the 18-year minimum age limit for voluntary recruitment, even when parental consent is involved. The true nature of "voluntary" recruitment is often open to question, especially in refugee or general displacement situations. Many young people in these situations join groups not through the exercise of free choice but rather are coerced through factors such as the need for physical protection, lack of food and care, destitution, indoctrination and pressure, and the hope of making up for loss of family and community. The requirement of parental consent is not always a guaranteed safeguard and may be rendered irrelevant in refugee situations, as refugee parents also often lack the capacity to make a fully voluntary decision.

5. It is also UNHCR's view that prohibition of participation in conflicts should cover both direct and indirect participation. We should highlight that the risks encountered and the fundamental rights denied are similar, whether one is participating directly in the conflict, or serving as a mine sweeper or porter. Furthermore, often indirect participation evolves into direct participation, either by will or as a matter of necessity.

6. Finally, it would also be important to ensure that the optional protocol address the situation of under-aged soldiers in non-governmental entities as well as government armed forces, obliging State parties to take all possible steps to prevent all recruitment of children. In the experience of UNHCR, this is imperative in order to reflect the reality of the situation in the world today, where most armed conflicts are within States.

7. UNHCR stands ready to further assist the working group in its deliberations in the drafting of this optional protocol in any way deemed appropriate. We also would like to take this opportunity to thank the Secretariat for sharing the relevant documentation, and for extending the Secretary-General's invitation to submit comments.

B. United Nations Population Fund

[Original: English]
[25 August 1998]

1. With respect to the draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, we would like to suggest that reference be made to exposure of girls to HIV/AIDS, early pregnancy and sexual violence, and therefore to the need for States parties to promote awareness in the public at large, including children, through information and education, and have readily available adequate quality care for adolescent girls and young mothers suffering from complications of unsafe abortion and sexual violence.

2. Although the situation varies greatly from region to region, and even within countries, a common thread seems to be the lower value ascribed to girls in relation to boys in virtually all countries. Gender-based violence and armed conflict exacerbate the already distressing situation of girls; therefore, government agencies and civil society should make every effort to generate and develop a collective understanding of gender issues and their impact on social values, community attitudes and the behaviour of girls.

C. Committee on the Rights of the Child

[Original: English]
[13 October 1998]

2. The Committee on the Rights of the Child has repeatedly restated its position in relation to the draft optional protocol and its various provisions. At its nineteenth session, the Committee adopted a recommendation urging States parties to adopt a draft optional protocol without further delay (see CRC/C/80, recommendation 1 attached). In line with its previous statements, the Committee would like to submit the following comments.

3. From its examination of the reports of States parties on implementation of the Convention on the Rights of the Child, the Committee is increasingly alarmed at the tragic consequences for children of their direct or indirect involvement in armed conflict. As the Committee concluded after the holding of its general discussion day on childrer in armed conflicts, during its second session in 1992:

"apart from article 38, the overall framework of the realization of the rights of the child set forth by the Convention should be ensured; ... reference was made to the importance of: protecting the family environment; ensuring the provision of essential care and assistance; ensuring access to health, food and education; prohibiting torture, abuse or neglect; prohibiting the death penalty; and the need to preserve the children's cultural environment, as well as the need of protection in situations of deprivation of liberty. Particular emphasis was also put on the need to ensure humanitarian assistance and relief and humanitarian access to children in situations of armed conflict. In this respect, special attention was paid to important measures, such as days of tranquillity and corridors of peace" (CRC/C/10, para. 73).

4. The fundamental rights of the child enshrined in the Convention are violated by direct involvement in armed conflict. The child's life and development are at risk; the right to psychological development, health, education, socialization and general well-being are seriously threatened. The lifelong legacy of trauma from child participation in armed conflict cannot be overstated. According to the 1996 United Nations study on the impact of armed conflict on children (A/51/306), in the past decade an estimated 2 million children have been killed in armed conflict. Three times as many have been seriously injured or permanently disabled, many of them maimed by landmines. In his 1998 report (E/CN.4/1998/119) the Special Representative of the Secretary-General on children in armed conflict stated that 250,000 children under the age of 18 are currently involved in armed conflict as child soldiers.

5. All children, defined by the Convention on the Rights of the Child as "every human being below the age of 18" (art. 1), deserve the highest standards of protection from the effects of armed conflict. The Committee has repeatedly formulated its strong belief in the need to complement the effective implementation of existing standards of protection under the Convention on the Rights of the Child with the improvement of the existing normative framework. In this sense, the Committee has resolutely restated and endorsed all calls for the drafting and adoption of an optional protocol to the Convention on the Rights of the Child which would require States that voluntarily ratify the optional protocol to raise the minimum age for mandatory recruitment or voluntary enlistment of children into the armed forces, and for direct or indirect involvement of children in hostilities, to 18 years.

6. The Committee condemns the discrimination against certain groups of children in their enjoyment of all the rights recognized in the Convention on the Rights of the Child which results from their mandatory recruitment or voluntary enlistment into armed forces.

7. Given the optional nature of the proposed protocol to the Convention on the Rights of the Child, the Committee wishes to restate its position that no reservations should be admitted.

8. As the function of optional protocols is to promote the progressive development of international law by enabling States that are willing to do so to adopt a higher standard, the Committee reiterates its hope that States that

are not yet in a position to accept the 18-year age limit will not prevent the adoption of an optional protocol by other States parties to the Convention.

RECOMMENDATION ADOPTED BY THE COMMITTEE ON THE RIGHTS OF THE CHILD AT ITS NINETEENTH SESSION

1. Children in armed conflicts

The Committee on the Rights of the Child,

Recalling that at its second session in 1992 the Committee devoted one day to a general discussion on the topic "Children in armed conflict" at which the relevance and adequacy of existing standards were discussed,

Noting the similarity of the conclusions on the negative effects of armed conflicts on children reached by the expert of the Secretary-General in her 1996 study entitled "The impact of armed conflict on children" (A/51/306 and Add.1) and by the Special Representative of the Secretary-General on the impact of armed conflict on children,

Recalling that at its third session it prepared a preliminary draft optional protocol to the Convention of the Rights of the Child (E/CN.4/1994/91, annex) which it submitted to the Commission on Human Rights at its fiftieth session,

Having welcomed the subsequent decision of the Commission on Human Rights, as contained in its resolution 1994/91, to establish an open-ended inter-sessional working group to elaborate, as a matter of priority, a draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,

Noting that the working group has met yearly since 1995 and that it was unable, at its fourth session, held in February 1998, to reach agreement on the draft text which could be adopted by consensus,

Welcoming Commission resolution 1998/76 and the request to the Secretary-General to invite the Committee, inter alia, to submit comments and suggestions on the report of the working group,

Reiterating its growing alarm, upon its examination of a large number of reports of States parties on their implementation of the Convention on the Rights of the Child, at the deeply tragic consequences of the involvement of children in armed conflict,

1. Expresses its concern at the delays experienced in the process of drafting and adopting the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;

2. Recalls that the function of optional protocols is to promote the progressive development of international law by enabling those States that are willing to adopt more demanding standards to do so;

3. Reaffirms its belief that this new legal instrument is urgently needed in order to strengthen the levels of protection ensured by the Convention;

4. Stresses the special responsibility of States parties to the Convention on the Rights of the Child in the search for the most protective solutions, guided by the best interests of the child;

5. Recalls its major recommendation on the fundamental importance of raising the age of all forms of recruitment of children into the armed forces to 18 years and the prohibition of their involvement in hostilities;

6. Also recalls that adoption of the optional protocol will provide an opportunity for States parties that are in a position to do so, and them alone, to accept its provisions by ratification or adherence;

7. Expresses the hope that States that are not yet in a position to accept the 18-year age limit will not prevent the adoption of the optional protocol by other Governments;

8. Invites States parties to make every effort to facilitate the adoption of the optional protocol on the involvement of children in armed conflict before the tenth anniversary of the adoption of the Convention on the Rights of the Child.

D. Council of Europe (European Commission on Human Rights)

[Original: French]
[1 October 1998]

1. The draft optional protocol may be welcomed as a laudable and necessary effort to guarantee and protect *in extenso* the rights of children.

2. While the proposed text seems perfectly adequate, a question nevertheless arises: would it not be useful to include a provision aimed at protecting children held as prisoners of war in cases of armed conflict involving one or more States parties and States using children in hostilities?

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

A. Friends World Committee for Consultation (Quakers)

[Original: English]
[23 September 1998]

1. The Friends World Committee for Consultation (Quakers) would like to submit, on behalf of the Coalition to Stop the Use of Child Soldiers, the following comments on the report of the working group on the draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.

2. After careful consideration of the texts annexed to the report we continue to believe that neither text sets adequate safeguards against the

recruitment of children and their use in hostilities. We therefore wish to propose the following as an alternative text for consideration.

PROVISIONAL DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

The States Parties to the present Protocol,

...

Welcoming the adoption of the Statute of the International Criminal Court, in particular the inclusion of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities as a war crime in both international and non-international armed conflicts,

Recalling the obligations of each party to an armed conflict to abide by the provisions of international humanitarian law,

Have agreed as follows:

Article 1

States parties shall ensure that persons who have not attained the age of 18 years are not compulsorily or voluntarily recruited into their armed forces.

Article 2

States parties shall ensure that persons who have not attained the age of 18 years do not take part in hostilities as part of their armed forces.

Article 3

(1) Persons under the age of 18 years should not be compulsorily or voluntarily recruited into armed groups, distinct from the armed forces of a State, nor take part in hostilities. States parties shall take all feasible measures to prevent such recruitment and participation.

(2) The application of the present provisions shall not affect the legal status of any party to an armed conflict.

Article 4

States parties shall make compulsorily or voluntarily recruiting persons under the age of 18 years into armed forces or armed groups or using them to participate in hostilities a criminal offence.

Article 5

No reservation to the present Protocol shall be permitted.

Article 6

States parties undertake to make the principles and provisions of the present Protocol widely known, by appropriate and active means, to adults and children alike.

Article 7

The States parties to the present Protocol shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with article 44 of the Convention on the Rights of the Child, information on the measures that they have adopted to give effect to the present Protocol.

Article 8

(1) The present Protocol is open for signature by any State which is a party to the Convention on the Rights of the Child or has signed it.

(2) The present Protocol is subject to ratification or open to accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

(3) The Secretary-General of the United Nations, in his capacity as depositary of the Convention and the Protocol, shall inform all States parties to the Convention and all States that have signed the Convention of each instrument of ratification or accession to the Protocol.

Article 9

(1) The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

(2) For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 10

(1) The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations together with the Convention on the Rights of the Child.

(2) The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States parties to the Convention and all States which have signed the Convention.

* * *

Commentary on the proposed text:

The preamble has been left incomplete. No exception is provided from the minimum age of 18 years for any form of recruitment or participation in hostilities. Participation as part of government armed forces is separated from other participation, thus enabling a higher level of commitment to prevent this by States parties to the Protocol. The question of recruitment into and participation in hostilities as part of armed groups has been combined into one provision, since the same considerations of balancing the obligation on States parties and on the armed groups themselves apply. The wording is based on that in annex II. Finally, a new article reflects the need for States parties to introduce legislation which would criminalize the activities of those who recruit or use in hostilities those under 18 years contrary to the protocol to provide effective national implementation.

Although the existence of the International Criminal Court could make a significant difference in relation to the enforceability of the prohibitions on the recruitment and use of under-15s, the Coalition also supports the inclusion of a provision along the lines of new article D in annex I which would enable the Committee on the Rights of the Child to consider situations where there is a practice of recruitment or use contrary to the provisions of the Protocol.

A question which might be worth exploring, and which might help to resolve some of the ambiguities and concerns expressed by States, is a definition of the term "recruitment".

B. International Federation Terre des Hommes

[Original: English]
[30 September 1998]

1. The International Federation Terre des Hommes (IFTDH) would like to submit the following comments, on behalf of the Sub-Group on Refugee Children and Children in Armed Conflict.

2. IFTDH and the Sub-Group on Refugee Children and Children in Armed Conflict are committed to the implementation of existing standards regarding involvement of children in armed conflicts, while recognizing that these need to be improved so as to ensure full protection of children in such circumstances.

3. We welcome the adoption of the Statute of the International Criminal Court and the inclusion of conscripting or enlisting children under the age of 15 years, or using them to participate actively in hostilities, as a war crime in both international and non-international armed conflicts. We urge States to become parties to this instrument.

4. IFTDH and the Sub-Group on Refugee Children and Children in Armed Conflict wish to reiterate their support for a clear and unequivocal optional protocol to the Convention on the Rights of the Child prohibiting the military recruitment and use in hostilities of any person younger than 18 years of age. Therefore, after careful consideration of annex I and annex II to

document E/CN.4/1998/102, we believe that neither text sets adequate safeguards against involvement of children in armed conflicts.

5. More than 300,000 children under the age of 18 are currently fighting in conflicts around the world and hundreds of thousands more are members of armed forces who could be sent into combat at any moment. As soldiers, children are lawful targets for attack and they are often treated brutally. Child soldiers risk injury, permanent disability or death. Of those who survive many bear lasting psychological scars from their experience. Child soldiers are also deprived of education or of opportunities to learn skills leading to responsible adulthood.

6. Under-18s should in no circumstances be recruited, either voluntarily or compulsorily, by governments or armed groups as this is the only effective way of preventing them from becoming involved in hostilities. Since a significant number of children are recruited by non-governmental armed groups, it is of great importance that the optional protocol includes the issue of recruitment of children by armed groups, and provides that States parties shall take all feasible measures to prevent such recruitment.

7. The protocol is optional, therefore reservations should not be permitted. However, we urge States who would not yet be in a position to ratify such an instrument to take the necessary steps to adapt their national legislation in order to be able to undertake this level of commitment as soon as possible.

8. At this moment the international community has the opportunity to set up a powerful tool protecting children from involvement in armed conflicts. It would therefore seem quite a contradiction in terms for the protocol to provide for such involvement by setting any other limit than 18 years of age for either recruitment into the armed forces or participation in hostilities.

C. World Alliance of Reformed Churches

[Original: Spanish]
[1 October 1998]

1. Article 1. This must be consistent with the Convention on the Rights of the Child and stipulate that a child is a person under 18 years of age. Furthermore, children must not be allowed to take part in hostilities or armed conflicts.

2. States parties must keep checks on the marketing of war toys that encourage or incite children to violence, hostility or warfare.

3. Article 2. We agree that no one under 18 years of age must be compulsorily recruited into the armed forces. Those countries which allow persons under 18 years of age to take part in hostilities or to enter the armed forces must be required to carry out rigorous psychological tests on the children before they are permitted to do so.

4. New article A. In Latin American countries, non-governmental armed groups are not only paramilitary or guerilla forces; we also have armed groups directed by adults that recruit children to form gangs with the purpose of committing crimes. These children are heavily armed and on occasion are victims of fighting between the children's gangs themselves. The rights of the child have to be protected in respect of these groups just as with regard to all other armed groups.

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